STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Murray, PJ, and Hoekstra and Stephens, JJ)

JAMES DOUGLAS,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court Docket No. 143503

Court of Appeals Docket No. 295484

Washtenaw Circuit Case No. 05-000596-NF

AMICUS CURIAE BRIEF OF COALITION PROTECTING AUTO NO-FAULT

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE* CPAN

The Coalition Protecting Auto No-Fault ("CPAN") is a broad-based, bipartisan coalition of 24 professional associations. These member associations include 16 medical provider organizations and 8 consumer organizations. The members of CPAN formed this organization for the sole purpose of preserving and protecting the unique and highly acclaimed reparations system that was created by the passage of the Michigan Automobile No-Fault Insurance Act in 1972 (MCL 500.3101, *et seq.*). Ever since the no-fault act went into effect in October of 1973, it has consistently garnered national accolades as a "model system." The central mission of CPAN is to protect and preserve the vitality of Michigan's auto no-fault insurance system so that it continues to provide comprehensive coverage and meaningful protections for Michigan citizens injured in motor vehicle accidents. CPAN's member organizations are identified below:

CPAN: Coalition Protecting Auto No-Fault	
Medical Provider Groups	**Consumer Organizations**
1. *Michigan State Medical Society*	1. *Brain Injury Association of Michigan*
2. *Michigan Osteopathic Association*	2. *Michigan Association for Justice*
3. *Michigan Health & Hospital Association*	3. *Michigan Citizens Action*
4. *Michigan Orthopaedic Society*	4. *UAW MI CAP*
5. *Michigan Association of Chiropractors*	5. *Michigan Protection and Advocacy Services*
6. *Amicare Medical*	6. *Michigan Paralyzed Veterans of America*
7. *Michigan Association of Centers for Independent Living*	7. *Michigan State AFL-CIO*
8. *Eisenhower Center*	8. *Michigan Tribal Advocates*
9. *Michigan Academy of Physician Assistants*	
10. *Michigan Brain Injury Providers Council*	
11. *Michigan Dental Association*	
12. *Michigan Nurses Association*	
13. *Michigan Orthotics & Prosthetics Association*	
14. *Michigan Rehabilitation Association*	
15. *Michigan Rehabilitation Services*	
16. *Spectrum Health*	

In its December 7, 2001, granting the application for leaver to appeal, this Court directed the parties to address "(1) whether the Court of Appeals erred in remanding this case to the trial court for further proceedings regarding the amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009, after finding that the trial court clearly erred in awarding attendant care benefits to the plaintiff without requiring sufficient documentation to support the daily and weekly hours underlying the award; (2) whether the plaintiff presented sufficient proofs at trial to support the trial court's award of attendant care benefits for the period before November 7, 2006; (3) whether activities performed by Katherine Douglas constituted attendant care under MCL 500.3107(1)(a) or replacement services under MCL 500.3107(1)(c); and (4) whether the trial court clearly erred in awarding attendant care benefits at the rate of $40 per hour."

A number of CPAN's members are in the business of providing in-home care to Michigan residents who have been catastrophically injured in automobile accidents or represent those who do so. They bring to this Court a special, practical knowledge regarding that care. As amicus curiae, CPAN seeks to share its concerns and experiences with this Court and to assist this Court in answering the questions raised.

INTRODUCTION

Home-based care provided both by medical professionals and family members is a critical and integral component of our healthcare delivery system and Michigan's no-fault system. It must not be tampered with in any way. Doing so would result in significant harm to the innumerable present and future seriously injured people who have and will receive the proven benefits of home-based care following an automobile accident. Those benefits include:

- Many patients need care following an accident but *not* in an institutional, nursing-home setting. Home care allows a patient to receive necessary care at the lowest cost.

- A warm and loving home environment, where the patient can be among family, keeps the patient comfortable and in good spirits, which has proven health benefits leading to less costly and often a quicker recovery.
- Agency provided home care permits family members to return to the workforce and move on with their productive lives, allowing them to contribute to Michigan's economy.
- Home care permits patients to remain living independently, as much as their disabilities allow, in the familiarity of home, which leads to faster recoveries.
- Home care improves medical outcomes and increases the patient's overall physical and psychological well-being.
- Home care professionals and relative caregivers are able to regularly observe the injured person's behavior and surroundings, which helps ensure that the injured person's living environment is safe and that the person is receiving proper nutrition and medication.
- Home care costs are often less than that of assisted living or nursing home care, yet injured persons often receive higher quality care from in-home professionals and relative caregivers, which also leads directly to better medical outcomes at lower costs.

CPAN knows that home-based care works. Patients receive better care at lower cost. The home-care system is not broken. It should not be fixed. It should be left alone, else patients will suffer.

LAW AND ARGUMENT

A. The Scope of Attendant Care Under MCL 500.3107(1)(a)

MCL 500.3107(1)(a) provides that "personal protection insurance benefits are payable for the following: (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." In order to recover these expenses, our Legislature has required a

claimant to show that "(1) the charge for the service was reasonable, (2) the expense was reasonably necessary [for an inured person's care, recovery or rehabilitation], and (3) the expense was incurred." *Williams v AAA Mich,* 250 Mich App 249, 258; 646 NW2d 476 (2002). The expense must also be "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle . . .." MCL 500.3105(1). This is all that the no-fault act requires.

Absent specific legislative direction to the contrary, as long as the incurred expense is reasonably necessary for the injured person's care, recovery, or rehabilitation, it is compensable under the no-fault act as a personal protection insurance benefit. This includes in-home attendant care, whether provided by a third-party provider or a family member. *Burris v Allstate*, 480 Mich 1081, 1084-1085; 745 NW2d 101 (2008) (Justice Corrigan concurring). There is no requirement in the no-fault act that the expense be incurred in a hospital or nursing home facility for it to be compensable. There is no requirement in the no-fault act that the caregiver have any medical training. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 180; 318 NW2d 679 (1982). **All that is required is that the there be an incurred expense that was reasonably necessary for the injured person's care, recovery or rehabilitation.**

In *Griffith v State Farm*, 472 Mich 521, 535-536; 697 NW2d 895 (2005), this Court held that our Legislature limited "the scope of the term 'care' to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. 'Care' is broader than 'recover' and 'rehabilitation' because it may encompass expenses for products, services, and accommodation that are necessary because of the accident that may not restore a person to his preinjury state." For example, as a result of a serious automobile accident, a catastrophically injured person is sometimes no longer able to

adequately perform activities of daily living such as toilet and grooming, and dressing and feeding himself. That injured person requires "care" to assist him in these activities even though that care may not restore him to his preinjury state. The expenses incurred for that care are compensable under MCL 500.3107(1)(a) as "attendant care."

By way of analogy, this Court can look to the Worker's Disability Compensation Act (WDCA) and interpreting case law for guidance. *Visconti v DAIIE*, 90 Mich App 477, 482; 282 NW2d 360 (1979) ("Both worker's disability compensation and automobile insurance are no-fault systems. It is reasonable to interpret these systems in a like manner when these statutory provisions appear to be affecting similar policies.") Under the WDCA, compensable "attendant care" includes "[s]erving meals in bed and bathing, dressing, and escorting a disabled person." *Kushay v Sexton Dairy Co*, 394 Mich 69, 74-75; 228 NW2d 205 (1975). These are not "ordinary" tasks such as "[h]ousecleaning, preparation of meals and washing and mending clothes . . .." *Id.* And, under the WDCA, "attendant care" is compensable to agency and relative caregivers alike on an on-call, hourly basis, recognizing that the time during which someone makes himself available to provide direct attendant care is time that the person might be performing others services or pursuing other interests. *Morris v Detroit Bd of Education*, 243 Mich App 189, 195-196; 622 NW2d 66 (2000); *Brown v Eller Outdoor Advertising Co*, 111 Mich App 538, 543; 314 NW2d 685 (1981).

Similarly, under the no-fault act, attendant care under MCL 500.3107(1)(a) is different than "replacement services" under MCL 500.3107(1)(c). "Replacement services" are limited to those "ordinary" and necessary services that, if the claimant had not been injured, he would have performed himself. They are also limited to an amount not exceeding $20 per day and are payable only for the first 3 years following an accident. They include only such "ordinary" services like housecleaning, laundering, mowing the lawn, shoveling the snow, taking

out the garbage, and grocery shopping. Because the injured person cannot do these household chores himself, he has a statutory right to have someone do these things for him, but compensation to that person is limited for these ordinary services to $20 per day and 3 years following the injury.

In this case, the Court of Appeals' opinion supports that the injured person's wife provided aide care, including supervisory and on-call care, **which plaintiff needed for some period of time during all waking hours**. She also needed to prompt or cue plaintiff to recall things, to assist him in organizing his life and activities, and to provide regular safety monitoring to plaintiff. **These are not "replacement services."** These are not household chores provided to the plaintiff by his wife. Instead, these are services that are reasonably necessary for the injured person's care. They are compensable as attendant care under MCL 500.3107(1)(a). To equate these services to "taking out the garbage," or to limit their compensation as such, is inconsistent with the text of the no-fault act. These services are not "ordinary"—they are reasonably necessary for the insured person's care.

Catastrophically injured persons often need on-call supervisory services performed in the home by aides and relative caregivers. If compensation for these services were denied or limited to compensation at the "replacement services" rate (and duration), these services could not be provided in the home and many of those injured persons would suffer dramatically or would need to placed in an institutional care setting, where the quality of the care is often lower and the charges for providing it is often higher. Compensating this care as attendant care services under MCL 500.3107(1)(a) is critical to the ability of injured persons to receive that care and fully consistent with the language employed by our Legislature in the no-fault act.

B. Quantum and Substance of Proof Necessary to Prove Entitlement to Attendant Care

Absent specific legislative direction, the substance and quantum of evidence necessary for an attendant care claimant to meet his burden of proof at trial is the same as any other civil case. In a no-fault attendant care case, like any other civil case, one needs to look no further than the civil jury instructions regarding burden of proof. M Civ JI 8.01(a) requires the plaintiff to prove with admissible evidence that it is more likely than not that a proposition disputed by the defendant is true. In a no-fault attendant care case, and under M Civ JI 35.01, this requires the claimant to prove that it is more likely than not that "plaintiff incurred allowable expenses which consist of reasonable charges for reasonably necessary products, services and accommodation for the plaintiff's care recovery or rehabilitation." Our Legislature has not delineated or proscribed the kind of evidence that must be brought forward to meet this burden.

Stated differently, an attendant care claimant must present evidence at trial sufficient for the finder of fact to conclude that it is more likely than not (1) that expenses were incurred, (2) that those expenses were reasonably necessary for the injured person's care, recovery or rehabilitation, and (3) that the value of those expenses are reasonably ascertainable. It is not necessary that a doctor provide the care to the injured person. *Green v Federal Kemper Ins Co*, 88 Mich App 364, 366-367; 276 NW2d 887 (1979) (holding that nurses are permitted to testify that their care was reasonably necessary, contrary to the carrier's doctor's opinion.) A doctor's order is not necessary, a prescription is not required, and a medical opinion is not even called for under the act. None of these requirements is found in the language of that no-fault act. **The no-fault act only requires that the incurred expense be reasonably necessary for the injured person's care in order for it to be compensable.**

C. Valuing Attendant Care Services

Unless the legislature specifically says otherwise, the valuation of attendant care services can properly depend upon a multitude of factors. Our Legislature has required only that an expense be "reasonable" for it to be compensable. For attendant care provided by an agency, the touchstone for reasonableness has routinely been the marketplace, namely, what other like agency providers are charging for the same or similar service. In such an analysis, there will be some acceptable deviations among agency providers, but **excessive expenses** are not compensable under the no-fault act.

For non-agency providers, such as family members, determining whether a claimed expense is reasonable can involve a consideration of many factors. For example, agency rates for attendant care can have relevance in the reasonable rate chargeable by a family member care giver. *Hardrick v ACIA*, __ Mich App __ ; __ NW2d __ (2011) (2011 WL 6003968). The wages paid by agency providers to their employees is another factor that can be considered. *Id.* Evidence of the "overhead" incurred by the relative caregiver is also relevant to determining a reasonable charge for the caregiver's services. *Id.*, citing *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499; 370 NW2d 619 (1985). Another important component to consider in determining whether a relative caregiver's charge is reasonable is the lost "opportunity cost" to the caregiver when providing care to a loved one. Relative attendant caregivers often give up engaging in some activity in order to provide care to a loved one. *Hardrick, supra.* These economic value choices are real and not prohibited considerations under the no-fault act for determining whether a relative caregiver's charge is reasonable. Also, the seriousness of the underlying injury and the claimant's resulting disability also are important factors in determining whether a relative caregiver's charge is reasonable.

Our Legislature has not said that the charges of a relative caregiver should be less than an agency caregiver. The only benchmark is "reasonableness." Carriers, without any basis in the text of the no-fault act, often refuse to compensate relative caregivers at the same rate as third-party caregivers. They do so even though the care they provide is often higher quality than the care provided by others. This is illogical and inconsistent with the no-fault act's text. If the billed charges are "reasonable," they must be paid, whether the charges are for services provided by a family member or by an agency caregiver. "Reasonableness" contemplates flexibility. There is not a fee schedule in the no-fault act. There can be and often is a range of reasonable charges associated with a particular service. But as long as the charge does not fall outside the range of reasonableness, it must be paid under the no-fault act. **Only if the charge is unreasonable (or excessive) has our Legislature prohibited full payment.**

D. Attendant Care Services are Incurred When the Services are Provided

MCL 500.3107(1)(a) provides that expenses must be "incurred" before they can be compensable as personal protection insurance benefits. In *Burris, supra*, this Court held that the plaintiff failed to establish that he *incurred* attendant care expenses because his attendant care providers did not expect compensation for their services. Relying upon *Proudfoot v State Farm Mut Ins Co,* 469 Mich 476, 484; 673 NW2d 739 (2003), this Court referenced the following dictionary definition of "incur": "[t]o become liable or subject to, [especially] because of one's own actions." "Liable" means "obligated according to law or equity: responsible." *Webster's Ninth New Collegiate Dictionary* (1987). Thus, the definition of "incur" adopted in *Proudfoot* requires a legal or equitable obligation to pay.

> Under ***Proudfoot***, the term "incur" does not mean that an insured must necessarily enter contracts with the care provider to be entitled to reimbursement for attendant-care expenses ("liable" means "obligated according to law *or equity*"). Nor does it mean that an insured must necessarily present a formal bill establishing that the attendant-care services were provided. It merely means that the insured must have an obligation to pay the attendant-care-service providers for

> their services. I agree with Justice Kelly that in determining allowable attendant-care expenses, there is no basis to treat family members differently than hired attendant-care-service workers. But to incur an expense for attendant-care services, the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment.

Burris, supra at 1084-1085, Justice Corrigan's concurring opinion (emphasis in original).

Nowhere in the no-fault act does our Legislature require that the caregiver have a "reasonable expectation of payment" **at the time he provides the services**. As a practical matter, many non-agency relative caregivers make significant sacrifices to provide reasonably necessary care to a loved one who has been injured in a motor vehicle accident **but do so without knowing that they are entitled to compensation for their valuable services until a later date**. This is starkly different than the situation where a relative attendant caregiver knows that he is entitled to compensation for his services, provides the services with that knowledge, and affirmatively waives his statutory right to payment. Benefits must be awarded and paid if they are substantiated and *not* affirmatively and intelligently waived. They should not be paid *only* if the caregiver intelligently and affirmatively waives the right to the payment. A caregiver cannot provide a service with a "reasonable expectation of payment" if the caregiver does not know that he is entitled to payment for his services; he cannot waive a right to payment when he has no knowledge that it exists.

In the absence of an expression of our Legislature to the contrary, attendant care service are incurred when services are rendered without regard to any expectation of the caregiver for payment, unless the caregiver knew that he was entitled to be compensated for his services and expressly waived any right to compensation.

E. Documentation Necessary to Prove Attendant Care Services

An attendant caregiver, like any other first-party no-fault claimant, must meet the requirements of MCL 500.3142(2) in documenting his claim for personal insurance protection

benefits: "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of the loss sustained." In *Williams v AAA, supra*, the Court of Appeals reviewed a trial court's decision whether a particular communication constituted reasonable proof of the fact and the amount of loss under MCL 500.3142(2). The Court concluded that a cover letter and a billing statement constituted reasonable proof of the fact and the amount of a loss, holding that MCL 500.3142(2) "requires only reasonable proof of the amount of loss, not exact proof."

> Once plaintiff armed defendant with the information from MFBH containing a total amount billed and an amount paid by BCBSM, defendant, if it had desired to challenge or investigate the amount purportedly paid by BCBSM, could have and should have conducted some investigation of its own during the thirty-day legislative grace period to establish a lesser amount of uncoordinated benefits owed. Our adoption of defendant's proposed interpretation of MCL 500.3142(2) would contravene the purpose of the no-fault act to provide accident victims with assured, adequate, and prompt reparations by permitting an insurer to ignore definite but inexact claims. Accordingly, we affirm the trial court's imposition of no-fault penalty interest.

Any suggestion that an attendant care provider is required to substantiate the services provided to an injured person beyond a description of the services provided, the time spent providing them, and the value of those services finds no support in the no-fault act and interpreting case law. Reasonable proof is all that is required, not exact proof

CONCLUSION

As discussed above, the benefits to patients found in the existing home care system are substantial, as the cost savings to the system as a whole. In deciding this case, this Court should not effect any changes upon that system. Any changes must be left to the Legislature, not the Courts.

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